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Supreme Court, U.S.
FILED
JUN 22 2001
CLERK

No. 00-1745

In The

Supreme Court of the United States

ARLENE COOPER and CALVIN STOUDT,

Petitioners,

v.

CONNIE G. POWELL,

Respondent.

On Petition For Writ Of Certiorari To The Wisconsin Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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JURISDICTION

Petitioners contend the decision of the Wisconsin Supreme Court found a constitutionally protected property right in continuing a post-secondary education and denied the petitioners qualified immunity defense. (Petition p. 2) However, under Wisconsin law, the equally divided decision of the Wisconsin Supreme Court has no value or affect as precedent, other than to automatically affirm the decision of the Wisconsin Court of Appeals. *Ives v. Cooperstool, Div. of Casper Industry*, 208 Wis. 2d 55, 559 N.W. 2d 571, 573 (1997); *State ex rel. Thompson v. Jacobson*, 199 Wis.2d 714, 719, 546 N.W. 2d 140 (1996); *State v. Elam*, 195 Wis.2d 683, 685, 538 N.W. 2d 249, 250 (1995).

Rule 10 of the Supreme Court Rules sets forth the jurisdictional rules applicable to this petition. There is no decision of a United States Court of Appeals under Rule 10(a), or decision of a state court of last resort in conflict with another state court of last resort or United States Court of Appeals under Rule 10(b). The Supreme Court has jurisdiction to review the Wisconsin Supreme Court decision in this case only if there has been the "decision" of an important question of federal law that has not been, but should be, settled by this Court, or a "decision" of an important federal question in a way that conflicts with relevant decisions of this Court, under Rule 10(c). The petition for review herein requests a writ of certiorari to review the "decision" of a divided Wisconsin Supreme Court, which under the Wisconsin law cited above, has no precedent value or affect other than to automatically affirm the Wisconsin Court of Appeals. Without a "decision" to review, in the sense of a decision with precedent

value, there can be no review by writ of certiorari under Rule 10(c).

STATEMENT OF THE CASE

Petitioners contend that Powell brought suit against them alleging that her right to due process under the Fourteenth Amendment was violated by the requirement that she disclose her manic depressive condition to the practicum supervisor as a prerequisite of participating in the practicum. (Petition p. 3) Powell alleged that her right to due process under the Fourteenth Amendment was violated by the lack of any hearing to determine whether it was necessary for her to disclose her manic depressive condition to her practicum supervisor as a prerequisite of participating in the practicum. (App. 59a, ¶ 18)

Petitioners contend the Wisconsin Court of Appeals and the Wisconsin Supreme Court upheld the decision of the circuit court in denying Petitioners motion to dismiss the case on qualified immunity grounds (Petition p. 4). The Wisconsin Court of Appeals upheld the decision of the circuit court, and the Wisconsin Supreme Court automatically affirmed the Wisconsin Court of Appeals on the basis of a tie vote. (5a, ¶ 12).

REASONS FOR DENYING THE WRIT

This is not an appropriate case for review of the issues raised by Petitioners. Petitioners contend the decision of the Wisconsin Supreme Court recognized a constitutionally protected property interest that has never been established by this Court, and makes available a substantive due process standard of review that has not been mandated in prior cases. The decision of the Wisconsin Supreme Court, which Petitioners ask this Court to review, was decided by a divided court and as a result has no precedent value or effect on these issues under Wisconsin law, other than to automatically affirm the decision of the Wisconsin Court of Appeals. (App. 5a, ¶ 12) *Ives v. Cooperstool, Div. of Casper Industry*, 208 Wis. 2d 55, 559 N.W. 2d 571, 573 (1997); *State ex rel. Thompson v. Jacobson*, 199 Wis. 714, 719, 546 N.W. 2d 140 (1996); *State v. Elam*, 195 Wis. 2d 683, 685, 538 N.W. 2d 249, 250 (1995). Consequently, a tie vote in the Wisconsin Supreme Court could not recognize a constitutionally protected property interest or make available a substantive due process standard of review.

Further, this matter is before this Court on an interlocutory appeal, which is not res judicata in any subsequent matters on the issues of the existence of a constitutionally protected property interest or the availability of substantive due process under facts similar to this matter. In *U.S. v. Hatter*, No. 991978, 05/21/01, (this Court noted an affirmance by an equally divided court is conclusive and binding upon the parties as respects the controversy, citing, *United States v. Pink*, 315 U.S. 203, 216 (1942); in *Hertz v. Woodman*, 218 U.S. 205, 213-14 (1909) (this Court held that while the affirmance of a judgment

by this court by a divided court is a conclusive adjudications between the parties, it is not authority on the principles of law involved for the determination of other cases in this or in inferior courts); in *Durant v. Essex Company*, 74 U.S. (7 Wall) 107, 113 (1868) (this Court stated, "The statement which always accompanies a judgment in such case, that it is rendered by a divided court, is only intended to show that there was a division among the judges on the question of law or fact involved . . . .serves to explain the absence of any opinion on the cause, and prevents the decision from becoming an authority for other causes of like character"). As noted in *Neil v. Biggers*, 409 U.S. 188, 190-192 (1972) (a tie voted is not an actual adjudication and does not establish precedent binding on this Court).

Consequently, as the Wisconsin Supreme Court was equally divided on the issues of the existence of a constitutionally protected property interest or the availability of substantive due process this Court's decision on those issues would have no effect on future cases by res judicata.

ARGUMENT

I. A CONSTITUTIONALLY PROTECTED PROPERTY INTEREST IN CONTINUING A POST-SECONDARY EDUCATION HAS LONG BEEN RECOGNIZED UNDER WISCONSIN AND FEDERAL LAW.

A. The Wisconsin Supreme Court's decision did not establish any principles of law.

Petitioners contend that the Wisconsin Supreme Court's decision established a constitutional right not previously recognized by this Court. As previously noted, under Wisconsin law, the Wisconsin Supreme Court's decision, by an equally divided court, had no precedent value whatsoever. *Ives v. Cooperstool, Div. of Casper Industry*, 208 Wis. 2d 55, ___, 559 N.W. 2d 571, 573 (1997). The Wisconsin Supreme Court has previously held that, under general principles of appellate practice, a majority of participating justices must have agreed on a particular point for it to become considered the opinion of the court. *State ex rel. Thompson v. Jacobson*, 199 Wis. 2d 714, 719, 546 N.W. 2d 140 (1996); *State v. Elam*, 195 Wis. 2d 683, 685, 538 N.W. 2d 249, 250 (1995). Consequently, the Wisconsin Supreme Court's decision in this case, by a divided court, while final, does not establish any constitutional rights, but merely affirms the decision of the Wisconsin Court of Appeals. (App. 9a-28a)

B. The ruling of the Wisconsin Supreme Court was not contrary to decisions of this Court.

Further, Petitioners contend that the finding of a clearly established constitutional right to continue a post-graduate education by the Wisconsin Supreme Court

appears contrary to this Court's decision in *San Antonio Independent School District v. Rodriquez*, 411 U.S. 1, 34, 35 (1973) (where it was held that education was not a right recognized by this Court as guaranteed by the Constitution); and *Goss v. Lopez*, 419 U.S. 565, 574 (1974) (where it was held that although Ohio was not constitutionally obligated to establish and maintain a public school system, once it did so its students had constitutional rights to due process under the Fourteenth Amendment).

However, *Goss v. Lopez* also holds that protected interests in property are normally created and defined by a source independent of the Constitution, such as state statutes or rules, which entitle citizens to certain benefits, citing *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Goss v. Lopez*, 419 U.S. at 572-73. Lower courts have held that when a state adopts legislation that directs its state colleges shall be open to all residents of the state upon the payment of a reasonable tuition, the state creates a claim of entitlement to an education in its state college system which warrants due process protection. *Harris v. Blake*, 799 F. 2d 419, 422 (10th Cir. 1986). Wisconsin has created such an entitlement in Wis. Stats. §§ 36.01 and 36.27, wherein the Wisconsin Legislature declares it in the public interest to provide a system of higher education which enables students of all ages, backgrounds and levels of income to participate in the search for knowledge and individual development upon the payment of tuition established by the board of regents.[1]

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[1] Wis. Stats. § 36.01,"The legislature finds it in the public interest to provide a system of higher education which enables students of all ages, backgrounds and levels of income to

C. Reliance on *Frank v. Marquette University.*

Petitioners contend the Wisconsin Court of Appeals' reliance on *Frank v. Marquette University*, 209 Wis. 372, 377, 245 N.W. 125 (1932) and *Martin v. Helstad*, 578 F. Supp. 1473, 1480 (W.D. Wis. 1983), in finding that a property right in a continuing post-secondary education existed, is misplaced. Petitioners contend that *Frank* does not stand for the proposition that a student has a constitutionally protected interest in continuing in a program of graduate study, as Frank sued a private university based on a contract theory, which did not involve a state action with Fourteenth Amendment or other constitutional issues. The Wisconsin Court of Appeals noted the Wisconsin Supreme Court in *Frank*, while not specifically referring to a property interest in the continuance of a college education, did find the court held the claim to be one "to compel the defendant university specifically to perform its contract with [Frank]" *Id.* at 377, 245 N.W. at 126, as a result of which the court found Frank had the right to continue in a course of study, a right protected from arbitrary and capricious state action. (App. 16a) In other words, regardless of whether *Frank* involved a state action or suit against a private university, the Wisconsin Supreme Court addressed the issue of a student's right to

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participate in the search for knowledge and individual development which stresses undergraduate teaching as its main priority; which offers selected professional graduate and research programs with emphasis on state and national needs . . . "

Wis. Stats. § 36.27(1)(a), "The board may establish for different classes of students differing tuition and fees incidental to enrollment in educational programs or use of facilities in the system.

continue in a course of study without the arbitrary or capricious interference with such right.

Petitioners also contend that *Frank* relies on *Booker v. Grand Rapids Medical College*, 156 Mich. 95, 120 N.W. 589 (1909), which this Court characterized in *University of Michigan v. Ewing*, 474 U.S. 214 (1985) as "an antiquated race discrimination decision . . . whose holding has since been overtaken by events." While *Frank* cites *Booker*, it also cites such other cases such as *People ex rel. Cecil v. Bellevue Hospital Medical College*, 60 Hun. 107, 14 N.Y.S. 490 (1891) (when a student matriculates, it is a contract between the college and student that if he complies with the terms of the college, he is entitled to graduate); *Valentine v. Independent School District*, 187 Iowa 555, 174 N.W. 334, 6 A.L.R. 1525 (1919); (student was entitled to mandamus to obtain diploma when school acted in an arbitrary manner in refusing to issue diploma because student would not wear cap and gown). *Hamlett v. Reid*, 165 Ky. 613, 177 S.W. 440 (the law will not permit the purpose for which the school was created to be thwarted by the arbitrary action on the part of a member of the board); *State ex rel. Nelson v. Lincoln Medical College*, 81 Neb. 533, 116 N.W. 294 (1908), (when a student has fulfilled all demands of the institution and passed all examinations so as to be entitled to a diploma, and the directors arbitrarily and capriciously refuse to graduate the student, it is the duty of the court to issue a writ of mandamus to compel issuance of the diploma) *Frank* at 127. Therefore, to characterize *Frank* as relying on an "antiquated race discrimination decision", overstates the importance of *Booker* in the *Frank* case. *Frank* stands for

the proposition that a student has a constitutionally protected property interest in continuing a graduate school education that a college, state or private, cannot interfere with in an arbitrary or capricious manner.

D. Reliance on *Martin v. Helstad.*

Petitioners further contend that *Martin* states, with little elaboration, that there is a property right in continuing in law school. *Martin* is not law school specific, in that it clearly states, "Courts and state law recognize a property interest in continuing education once a student has begun the course of study. In support of this proposition, *Martin* does elaborate by citing *Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 79, 98 S.Ct. 948, 55 L. Ed. 2d 124 (1978); *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L. Ed. 2d 725 (1975); *Betts v. Board of Education*, 456 F.2d 629 (7th Cir. 1972). The *Martin* court further elaborates by citing Wis. Stats. § 36.05(11) (1981-82) for the proposition that "a 'student' is a person who is registered for study in an academic institution." In affirming the district court's initial decision in *Martin*, the Seventh Circuit Court of Appeals cited, Wis. Stats. § 36.05(11) (1979) which defines a student as a person who is registered for study.[2] For that reason, on the basis of *Goss v. Lopez*, *Martin* provides, "on the basis of state law appellees plainly had legitimate claims of entitlement to a public education. Further, all the cited cases and cases

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[2] Wis. Stats. § 36.05(11), "Student means any person who is registered for study in any institution for the current academic period."

uncovered in our research that discuss a student's property interest in his or her education acknowledge a property interest only in continuing the education." *Martin v. Helstad*, 699 F.2d at 399, n. 3. The language of *Martin* goes beyond the assumption of a property right, as Petitioners contend, to a property right based on case law and Wisconsin statute.

E. Reliance on *Horowitz* and *Ewing*.

Petitioners contend the Wisconsin Supreme Court failed to "fully" develop its analytical basis for concluding that a property interest existed, but that its decision in this case appears to rely heavily on the *Horowitz* and *Ewing* cases that such a right exists. A review of the Wisconsin Supreme Court's decision indicates that no reasoning was given for the existence of a property right as no such conclusion was reached by a majority of the court. Also there is no mention of either the *Horowitz* or *Ewing* cases when the tie vote on the existence of a property interest is discussed. (App. 51, ¶ 12) Consequently, Petitioners misstate the Wisconsin Supreme Court's analysis and its reliance on *Horowitz* and *Ewing*.

F. Case law in the lower courts.

Petitioners contend that the lack of a ruling from this Court on the constitutional issue of the existence of a property interest in continuing a post-secondary education has spawned extensive litigation of academic decisions and caused confusion in the lower courts, as illustrated by the case at bar. Petitioners go on to give

their opinion that lower courts have generally avoided the issue or assumed the right exists, often based on the parties' willingness to concede the existence of a constitutionally protected property interest under state law as in *Ewing*, 474 U.S. at 224; or for the sake of argument, as in *Horowitz*, 435 U.S. at 92. Petitioners' contentions that this Court's decisions in *Horowitz* and *Ewing*, lack rulings on the existence of a property interest and have caused confusion and litigation in the lower courts, leading to avoidance or assumption of the issue, is not supported by the case law in the lower courts. A review of the case law in the lower courts, as cited by Petitioners in their brief, shows that most courts have found a constitutional property interest in the continuance of a college education, once begun.

Courts Finding a Property Interest:

> *Stoller v. College of Medicine*, 562 F. Supp. 403, 412 (M.D. Pa. 1983), *aff'd without opinion*, 727 F. 2d 1101 (3d Cir. 1984) ("since Stoller has a constitutionally protected interest in continuing his medical education, substantive due process requires that his medical education not be terminated for 'arbitrary' or 'capricious' reasons"); *Unger v. National Resident Matching Program*, 928 F. 2d 1392, 1397 (3d Cir. 1991) (attempt to state a claim arising out of a property interest which failed as a matter of law, not because such an interest did not exist as Petitioners contend, but because such an interest only applied to students currently enrolled and not the plaintiff); *Dixon v. Alabama State Bd. of Education*, 294 F. 2d 150, 157 (5th), *certiorari denied*, 368 U.S. 930, 83 S. Ct. 608, 7 L. Ed. 2d 183 (1961) (found a right

to remain at a public institution of higher learning in which plaintiffs were students in good standing); *Stevens v. Hunt*, 646 F. 2d 1186 (6th Cir. 1981) (a qualified property right to study and practice medicine had long been recognized in the state of Tennessee); *Martin v. Helstad*, 699 F.2d 387, 388-89 (7th Cir. 1983) (found it was clear that a student had a property interest under Wisconsin law as a result of Wis. Stats. § 36.05(11), defining a "student" as a person that is "registered for study", noting the court's research indicated a student only had a property interest in a continuing education (footnote 2); *Atkins v. Bd. of Gov. of State Colleges and Univ.*, 840 F. 2d 1371, 1376 (7th Cir.1988) (adopted finding of magistrate that complaint stated a cause of action for violation of substantive due process rights based on contractual relationship of college or university with its students amounting to a property right in their continued education, although law regarding whether student had a substantive due process right was not established clearly enough to survive qualified immunity); *Gaspar v. Bruton*, 513 F.2d 843 (10th Cir. 1975) (found that, in light of *Goss v. Lopez*, which recognized a property right in public school students, that such a right must be recognized to have vested in *Gaspar*, even more so in that she paid a specific and separate fee for enrollment and attendance.); *Harris v. Blake*, 798 F. 2d 419, 422 (10th Cir. 1986) (found that relying on *Goss v. Lopez*, the state of Colorado had created the basis for a claim of entitlement to an education in its state college system, where the legislature had directed that state colleges "shall be open . . . to all persons resident in this state" upon payment of a reasonable tuition fee –

therefore Harris had a property interest in his enrollment which entitled him to due process.[3]); *Hall v. University of Minnesota*, 530 F. 2d 104, 107 (1982) (held a student's right in attending a university was a property right protected by due process); *Martin v. Helstad*, 578 F. Supp. 1473, 1480 (1983) (found that both courts and state law recognized a property right in a continuing education once a student had begun a course of study – citing Wis. Stats. § 36.05(11) defining a "student" as a person registered for study in an academic institution); *Anderson v. University of Wisconsin*, 665 F. Supp. 1372, 1396 (W.D. Wis. 1987) (court stated it would not argue with student's contention that a property interest in a continuing education existed once student had begun course of study); *Siblerud v. Colorado State Bd. of Agriculture*, 896 F. Supp. 1506, 1512 (D. Colo. 1995) (found property interest created by state law in the form of under Colorado statute opening state colleges to all who paid tuition, as plaintiff paid a specific fee for attendance); *Frank v. Marquette University*, 209 Wis. 372, 377, 245 N.W. 125, 127 (1932) (held law is well settled that a university, college or school may not arbitrarily or capriciously dismiss a student or deny him the right to continue his course of study); *Abbariao v. Hamline University Law School*, 258 N.W. 2d 108, 112 (Minn. 1977) (held that cases involving public universities demonstrate that student's interest in attending a university is a property right protected by due process); *Evans v. West Virginia Bd. of Regents*, 165 W. Va. 780, 781, 271 S.E. 2d 778,

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[3] See footnote 1, p. 6

780 (1980) (held student had a sufficient property interest in the continuation and completion of his medical education to warrant minimal due process protections). The overwhelming majority of cases cited by Petitioners contain findings by the courts involved that a property interest in a continuing college education protected by the constitution does exist.

Courts Assuming a Property Right Exists:

In several cases, the courts have assumed that a property interest exists in the continuation of a college education, usually where the courts find that sufficient due process was provided to the student regardless of the existence of either a property or a liberty interest. *Board of Curators, Univ. of Mo. v. Horowitz*, 435 U.S. 78 (1978) (found the student had been accorded sufficient due process even though Court assumed student had a constitutionally protected liberty or property interest existed); *Regents of University of Michigan v. Ewing*, 474 U.S. 214 (1985) (held student received sufficient due process even assuming he had a property interest in continuing his graduate education); *Hamil v. Vertrees*, 2001 WL 135716, p. 6 (M.D. Ala. Jan. 10, 2001). (All cases found by the court assume, without deciding, that a "student who is subject to academic dismissal may maintain a cause of action for the violation of his right to substantive due process."); *Nickerson v. Univ. of Alaska Anchorage*, 975 F. 2d 46, 52 (Alaska 1999) ("while we have not identified the interest implicated, we have noted that 'a school must provide minimal process before suspending or dismissing a student for disciplinary reasons"); *Shuler v. University of Minnesota*, 788 F.2d 510, 513, 514, n. 6 (8th Cir.

1986) (court assumed a property interest, finding student was accorded at least as much due process as Fourteenth Amendment required.); *Richmond v. Fowlkes*, 228 F. 3d 854, 857 (8th Cir. 2000) ("Assuming, without deciding, the existence of a property or liberty right, we conclude that Richmond received all the process that he was due.") *Haberle v. University of Alabama in Birmingham*, 803 F. 2d 1536, 1539, n. 1 (11th Cir. 1986) (court would assume the existence of a property interest, without deciding the issue as due process was found to be adequate); *Hammond v. Auburn Univ.*, 669 F. Supp. 1555, 1561 (M.D.Ala. 1982), *aff'd mem.*, 858 F. 2d 744 (11th Cir. 1988) ("Court assumed a constitutionally protected property right exists in post-secondary education.")

Courts Not Finding Property Interest:

Soong v. University of Hawaii at Hilo, 72 Haw. 586, 590, 825 P.2d 1060, 1062 (Haw. 1992) (plaintiff contended she had a constitutionally protected substantive due process right in continued enrollment at the university, but did not show such a right was clearly established).

Unpublished Cases:

Petitioners cite two cases that are unpublished, *Reidinger v. Board of Regents of University of Wisconsin*, 2001 WI App. 31, ¶ 6, 622 N.W. 2d 770 (Ct. App. 2000) and *Shudooh v. University of Wisconsin-Madison, et al.*, (Case No. 00-C-0267-C) (W.D. Wis. April 4, 2001.) (Slip op. at p. 14). Unpublished opinions are not precedent. *U.S. v. Ables*, 167 F. 3d 1021 (6th Cir. 1999) certiorari denied, 527 U.S. 1027. Further, unpublished cases may not be cited or used as precedent in

the Seventh Circuit. *Circuit Rule 52, Seventh Circuit.*

The above enumerations make it clear that the overwhelming majority of courts have found a constitutionally protected property interest in a continuing post-secondary education, once the course of study has begun. A minority of courts have assumed a property interest when they have also found sufficient due process was provided. A very few courts have not found or assumed a constitutionally protected property interest. While the existence of such a property interest may be an open question in the Seventh Circuit, the existence of such a property interest is clearly not an open question in many of the other federal circuits.

Far from the confusion Petitioners contend, it would appear that most courts have no problem with the concept that a constitutionally protected property interest exists in the continuation of a college or graduate education, once the course of study is begun; and that such a property interest can be assumed if there is a finding that sufficient due process was provided the student to satisfy the requirements of the Fourteenth Amendment. To contend, as Petitioners contend, that the question of whether there is a constitutionally protected property interest in continuing a graduate program remains unsettled and treated in widely varying ways by the lower courts is to seek confusion where none would appear to exist merely to justify Petitioners' petition for certiorari in this case.

II. THE WISCONSIN SUPREME COURT DID NOT DISCUSS A SUBSTANTIVE DUE PROCESS RIGHT TO REVIEW AN ACADEMIC DECISION.

A. The Wisconsin Supreme Court did not discuss substantive due process.

Petitioners contend the Wisconsin Court of Appeals, relying on *Ewing*, found Powell had a substantive due process right in continuing her education, a finding the Wisconsin Supreme Court affirmed. (Petition p. 14) As previously noted, the Wisconsin Supreme Court was equally divided in its per curiam ruling of February 16, 2001, which did not result in a "holding" or "finding" on any issue, including substantive due process. (App. 5a)

Actually, the Wisconsin Court of Appeals relied on *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 1716, 140 L.Ed.2d 1043 (1998), not *Ewing*, which holds, "the exercise of power without any reasonable justification in the service of a legitimate governmental objective" is the touchstone of a substantive due process claim. (App. 21a) After discussing Powell's liberty interests, which was later held waived by the Wisconsin Supreme Court for failure to plead (App. 2a, ¶ 3, 6a, ¶ 14), the Wisconsin Court of Appeals noted that the property right Powell asserted in her continuing course of study would be subject to the "shocks the conscience" standard in a substantive due process challenge as well as the standard of deliberate indifference. *County of Sacramento*, 118 S.Ct. at 1718. (App. 22a)

It may well be, under the facts of this case, that Powell could show the conduct of the Petitioners to be such that it would shock the conscience in ending her

graduate program without any due process whatsoever, exhibiting a deliberate indifference to Powell's rights to have some determination that her manic-depression would actually have a detrimental effect on her practicum. The use of a generic definition of manic-depression by Petitioners throughout their briefs exhibits a shocking disregard and indifference to the manic-depression suffered by so many, as two psychology professors such as Petitioners should have been aware.

B. Petitioners' decision was disciplinary, not academic.

Petitioners frequently contend in their briefs that their decision in demanding Powell disclose her manic-depression condition to her practicum site supervisor was an academic and not a disciplinary decision. The reason for this contention is obvious, as courts have traditionally and frequently given deference to the academic decisions of academic institutions and their faculty, as can be noted from the decisions on failing grades, course and curriculum requirements and clinical placement cited by Petitioners in their brief in support of certiorari. (Petition p. 16-18) In other words, academic personnel attempt to cloak their decisions as academic decisions to escape close scrutiny by the courts, which usually required more due process for disciplinary than academic decisions.

To substantiate their contention that their decision was academic, Petitioners cite a number of cases involving failing grades in a graduate school setting. (Petition p. 16) However, Powell enjoyed a 3.887 cumulative grade-point average on a 4.0 grade-point system, with no failing

grades in any aspect of her graduate program. (Petition p. 3)

In the same effort, Petitioners cite a number of cases concerning the failure of graduate students to meet course and curriculum requirements (Petition pp. 16-17). However, Powell was a graduate student in good standing at the time she was ordered to disclose her manic-depression condition in January of 1991, with no prior problems with remedial plans, oral examinations, retaking examinations, examinations prior to dissertations, or excessive absenteeism. (Petition p. 3)

Finally, petitioners cite a number of cases involving the problems of graduate or professional students with clinical placement. (Petition pp. 17-18) However, Powell was never granted the opportunity to participate in a clinical placement and therefore had no opportunity to display any problems based on lack of skills, performance problems, interpersonal problems in her practicum, or suggested removal by agencies involved in her practicum.

Powell's academic preparation for a graduate degree was complete except for her practicum and thesis. Petitioners' directive to disclose was not an academic decision, but a faculty directive, which resulted in Powell's expulsion from her graduate program when she refused to obey the directive. Not allowing Powell's graduation was plainly disciplinary. Powell was given a directive which she refused to obey and was punished for her refusal.

Petitioners contend that unresolved constitutional issues in *Horowitz* and *Ewing* have led to 20 years of

assuming such rights as Powell claims exist, and assuming courts are in a better position than professional educators to make academic decisions. (Petition p. 19) However, this is not an academic decision. Petitioner further contends that, as a result, Courts have expanded substantive due process to areas beyond which it has been traditionally limited. *Albright v. Oliver*, 510 U.S. 266, 271-272 (1994). It now includes the right to second-guess grades, the format of examinations, clinical skills, policies on test contents, and performance evaluations. (Petition p. 19) However, as noted above, none of these academic considerations apply to this matter.

Petitioners contend that nationwide, students will now attempt to use this case as precedent to claim constitutional protections in a variety of academic decisions, such as grades, examinations, curriculum requirements, clinical programs, extra-curricular programs and student evaluation. (Petition p. 19) However, in that the ruling of the Wisconsin Supreme Court was equally divided and had no precedent value, as well as constituting an interlocutory ruling without res judicata effect, this contention is without merit.

III. THE DIVIDED OPINION OF THE WISCONSIN SUPREME COURT IS NO HOLDING, DIRECTLY OR INDIRECTLY, REGARDING THE EXISTENCE OF A CONSTITUTIONALLY PROTECTED PROPERTY RIGHT IN CONTINUING A HIGHER EDUCATION PROGRAM, BUT SUCH RIGHT WAS CLEARLY ESTABLSIHED BY A CONSENSUS OF THE CASE LAW IN JANUARY OF 1991, WHEN PETITIONERS ACTED.

A. The divided decision of the Wisconsin Supreme Court resulted in no holding in regard to the existence of a constitutionally protected property right in Powell's continuation of her program of graduate school education.

Petitioners contend the Wisconsin Supreme Court was incorrect in holding, indirectly, that a constitutionally protected right for Powell to continuing her higher education program was clearly established in 1991. (Petition p. 20) As previously noted, the Wisconsin Supreme Court could not hold there was a constitutionally protected right in Powell continuing in a higher education program, as the court was equally divided on this issue. Three justices voted to affirm the court of appeals' conclusion that such a property right existed at the time in question, was clearly established, and defendants were not entitled to qualified immunity; while three other justices concluded that even though such a property right existed at the time, it was not well enough established and the defendants were entitled to qualified immunity. (App. 5a) Consequently, there was no holding of a clearly established property right in 1991 either directly or indirectly.

B. There was a sufficient consensus of the case law in January of 1991 that Powell's property rights in continuing her education were clearly established, and the actions of Cooper and Stoudt were unlawful.

The only issue in this matter, relevant to qualified immunity, is whether Powell had a constitutionally protected property interest in continuing her graduate school education which was established by a clear consensus of case law in January of 1991, when Cooper and Stoudt acted in the manner challenged by this action. That Powell received no due process is clear from the facts in this matter, as there is no appearance of any hearing held to determine if Powell needed to disclose her manic-depression condition to her practicum site supervisor, nor even an investigation of any kind to determine that such disclosure was necessary in Powell's case.

To prove the presence of a clearly established constitutional right, the plaintiff must point to "closely analogous cases" decided prior to the defendants' challenged actions. *Rakovich v. Wade*, 850 F.2d 1180, 1205 (7th Cir.), *certiorari denied*, 488 U.S. 968, 109 S.Ct. 47, 102 L.Ed. 2d 534 (1988). Adjusting the enumeration of cases set forth in part I of this argument for cases decided before actions of Cooper and Stoudt in January of 1991, the state of the law at that time appears as follows:

Courts Finding a Property Interest Prior to Petitioners' Actions

> *Stoller v. College of Medicine*, 562 F. Supp. 403, 412 (M.D. Pa 1983), *aff'd without opinion*, 727 F. 2d 1101 (3d Cir. 1984) ("since Stoller has a constitutionally protected interest in continuing his medical education, substantive due process

requires that his medical education not be terminated for 'arbitrary' or 'capricious' reasons"); *Dixon v. Alabama State Bd. of Education*, 294 F. 2d 150, 157 (5th), *certiorari denied*, 368 U.S. 930, 83 S. Ct. 608, 7 L. Ed. 2d 183 (1961) (found a right to remain at a public institution of higher learning in which plaintiffs were students in good standing); *Stevens v. Hunt*, 646 F. 2d 1186 (6th Cir. 1981) (a qualified property right to study and practice medicine had long been recognized in the state of Tennessee); *Martin v. Helstad*, 699 F.2d 387, 388-89 (7th Cir. 1983) (found it was clear that a student had a property interest under Wisconsin law as a result of Wis. Stats. § 36.05(11), defining a "student" as a person that is "registered for study", noting the court's research indicated a student only had a property interest in a continuing education); *Gaspar v. Bruton*, 513 F.2d 843 (10th Cir. 1975) (found that, in light of *Goss v. Lopez*, which recognized a property right in public school students, that such a right must be recognized to have vested in *Gaspar*, even more so in that she paid a specific and separate fee for enrollment and attendance.); *Harris v. Blake*, 798 F. 2d 419-422 (10th Cir. 1986) (found that relying on *Goss v. Lopez*), the state of Colorado had created the basis for a claim of entitlement to an education in its state college system, where the legislature had directed that state colleges "shall be open . . . to all persons resident in this state" upon payment of a reasonable tuition fee (citations) – therefore Harris had a property interest in his enrollment which entitled him to due process.[4]); *Hall v.*

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[4] See footnote 1, p. 6. At the time Powell was ordered to disclose her condition, she had paid her tuition and was student in good standing. (Petition p. 3)

University of Minnesota, 530 F. 2d 104, 107 (1982) (held a student's right in attending a university was a property right protected by due process); *Martin v. Helstad*, 578 F. Supp. 1473, 1480 (1983) (found that both courts and state law recognized a property right in a continuing education once a student had begun a course of study – citing Wis. Stats. § 36.05(11) defining a "student" as a person registered for study in an academic institution); *Anderson v. University of Wisconsin*, 665 F. Supp. 1372, 1396 (W.D. Wis. 1987) (court stated it would not argue with student's contention that a property interest in a continuing education existed once student had begun course of study); *Frank v. Marquette University*, 209 Wis. 372, 377, 245 N.W. 125, 127 (1932) (held law is well settled that a university, college or school may not arbitrarily or capriciously dismiss a student or deny him the right to continue his course of study); *Abbariao v. Hamline University Law School*, 258 N.W. 2d 108, 112 (Minn. 1977) (held that cases involving public universities demonstrates that student's interest in attending a university is a property right protected by due process); *Evans v. West Virginia Bd. of Regents*, 165 W. Va. 780, 781, 271 S.E. 2d 778, 780 (1980) (held student had a sufficient property interest in the continuation and completion of his medical education to warrant minimal due process protections).

All of the cases cited above, with the exception of *Frank v. Marquette University*, from the federal circuit courts of appeal, federal district courts and Wisconsin Supreme Court clearly hold that the student had a constitutionally protected property right in continuing the student's college or graduate education. *Frank* discusses

substantive due process and the arbitrary loss of enrollment. Consequently, there is a clear consensus in the case law prior to the actions of Cooper and Stoudt, which are challenged in this action.

Courts Assuming a Property Interest Existed Prior to Petitioners' Actions

The only cases that do not clearly hold a constitutionally protected property right or prohibit arbitrary loss of enrollment in violation of substantive due process, are those cases which assume the existence of a property right. All of these cases clearly treat circumstances in which sufficient due process was found to have been provided the student, making the existence of a constitutionally protected property right irrelevant.

In several cases, the courts have assumed that a property interest exists in the continuation of a college education, usually where the courts find the sufficient due process was provided to the student regardless of the existence of either a property or a liberty interest. *Board of Curators, Univ. of Mo. v. Horowitz*, 435 U.S. 78 (1978) (found the student had been accorded sufficient due process even though Court assumed student had a constitutionally protected liberty or property interest existed); *Regents of University of Michigan v. Ewing*, 474 U.S. 214 (1985) (held student received sufficient due process even assuming he had a property interest in continuing his graduate education); *Shuler v. University of Minnesota*, 788 F.2d 510, 513, 514, n. 6 (8th Cir. 1986) (court assumed a property interest, finding student was accorded at least as much due process as Fourteenth Amendment required.); *Haberle v. University of*

Alabama in Birmingham, 803 F. 2d 1536, 1539, n. 1 (11th Cir. 1986) (court would assume the existence of a property interest, without deciding the issue as due process was found to be adequate); *Hammond v. Auburn Univ.*, 669 F. Supp. 1555, 1561 (M.D.Ala. 1982) *aff'd mem.* 858 F. 2d 744 (11th Cir. 1988) ("Court assumed a constitutionally protected property right exists in post-secondary education.")

Courts Finding No Property Interest Prior to Petitioners' Actions

Petitioners cite no cases decided prior to January, 1991, which hold that a constitutionally protected property interest in continuing a college education does not exist. Petitioners cite *Osteen v. Henley*, 13 F.2d 221, 236 (7th Cir. 1993); *Atkins v. Bd. of Gov. of State Colleges and Univ.*, 840 F.2d 1371, 1376 (7th Cir. 1988); and *Unger v. National Residents Matching Program*, 928 F.2d 1391, 1397 (3rd Cir. 1991). *Osteen* and *Unger* were decided after the actions of the Petitioners in this case, and therefore they could not have been aware of the uncertainty created by these cases at the time of their actions. *Atkins* is the only case Petitioners cite, which was decided before their actions were filed, and which states the existence of a property interest in continued enrollment is unclear, as compared to the array of cases cited above which find or assume the existence of such property right.

The Seventh Circuit Court of Appeals, in *Upton v. Thompson*, 930 F. 2d 1209, 1212 (7th Cir. 1991), set forth the law of qualified immunity at the time of the actions of Cooper and Stoudt in ordering Powell's disclosure in January of 1991. This case holds that the right the official is alleged to have violated must have been "clearly

established" in a "particularized way" and "the contours of the right must be sufficiently clear that a reasonable official would understand that what he or she is doing violates that right." *Anderson v. Creighton*, 481 U.S. 635, 640, 197 S.Ct. 3034, 3039, 97 L.Ed. 2d 523 (1987). In this case, the right of Powell to procedural due process as a result of her property interest in continued enrollment was clearly established in a particularized way, making the contours of the right sufficiently clear so that Petitioners would understand that by preventing Powell from continuing her education, they violated her right.

Further, whether an official may prevail in his qualified immunity defense depend upon the 'objective reasonableness' of his conduct as measured by referring to clearly established law. *Davis v. Scherer*, 468 U.S. 183, 191, 104 S.Ct. 3012, 3017, 82 L.Ed.2d 139 (1984). The objective reasonableness of the Petitioners' conduct, when measured against the cases cited above finding the right of continued enrollment, is clearly lacking. It is clear, from the law established prior to Petitioners' actions, that a property interest in continued enrollment existed in not just one but at least ten cases in a variety of federal and state courts. It was patently unreasonable for Petitioners to prevent Powell from continuing her education without at least some minimal due process in light of this repeated precedent that a right giving rise to due process existed.

The principle behind the doctrine is that "[I]f the law at the time was not clearly established, an official could not reasonably be

expected to anticipate subsequent legal developments nor could he fairly be said to know that the law forbade conduct not previously identified as unlawful." *Greenberg v. Kmetko*, 849 F. 2d 467, 472 (7th Cir. 1988); *Cygnar v. City of Chicago*, 865 F.2d 827, 843 (7th Cir. 1989). Based on the ten or so cases listed above, finding a property interest in continued enrollment existed, requiring some due process, the Petitioners could reasonably be expected to know the law forbade their conduct in preventing Powell from completing her practicum and her graduate education.

What is important, in the final analysis, is "whether the legal norms governing [the government official's] behavior were clearly established at the time of the challenged actions." *Wrigley v. Greanias*, 842 F.2d 956, 958 (7th Cir. 1988). The legal norms governing the Petitioners' behavior was clearly established at the time of their actions. This is not a matter of multiple cases on both sides of the issue, but the case of multiple cases finding a property interest in continued enrollment, and some case assuming such a right, with a few cases stating the question is unsettled. While Petitioners would like to contend these latter cases may have been confusing (Petition p. 20), the overwhelming authority finding the property interest makes such contention less than credible.

Further, Petitioners contend that "a split among courts regarding the constitutionality of conduct analogous to the conduct in question is an indication that the right was not clearly established at the time of the alleged violation", citing *Dennis v. Dunlap*, 209 F.3d 944, 950 (7th

Cir. 2000). (Petition p. 20) Not only was this case decided after the Petitioners' actions occurred, making it difficult for Petitioners to know about the proposition that a split in authority indicates that a right was not clearly established, but there is no real split in authority prior to their actions. There are some ten cases finding a property interest in continued enrollment, four or five cases assuming such a property interest, one case stating the existence of the property interest is unclear. This is not such a split in authority that would make Powell's property interest and right to due process less than clearly established.

Finally, Petitioners contend they should not be held to an understanding of constitutional law that the Wisconsin Supreme Court cannot agree upon. The Wisconsin Supreme Court's equal split of opinion in this case is only one case, when qualified immunity for Petitioners must be based upon a consensus of cases that show the law to be unclear on the issues of the existence of a property interest in continued enrollment and resultant due process rights. (Petition p. 22) It is the consensus that is pivotal in this matter, not the disagreement of the Wisconsin Supreme Court.

The consensus of precedent existing in 1991 was clear and overwhelming to establish the existence of a constitutionally protected property right giving rise to due process rights for Powell. Petitioners should have known of this right.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari herein should be denied.

Respectfully submitted,

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